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TO: Mayor Jordan

CC: Don Marr, Chief of Staff

FROM: Kit Williams, City Attorney

LITIGATION & NEGOTIATION HIGHLIGHTS OF 2014

I. Litigation Highlights

**A. *Hawkeye Towing Enforcement, Inc. v. City of Fayetteville*,
Washington County Circuit Court Case No. CV-2013-1845-7**

Hawkeye Towing, Inc. appealed the passage of the ordinance enacting regulations for companies using wheel clamps or boots within the Entertainment and Downtown parking districts. The City filed its response and designation of record and supplied the Agenda Packet, the City Council Meeting Minutes and a DVD of the City Council meeting to the Court.

The Judge requested briefs and directed the towing company to present its brief by December 18 with the City's reply brief due 30 days thereafter. After Hawkeye Towing Enforcement, Inc. filed its seventeen page Appellant's Brief, the City Attorney prepared and filed the City's seventeen page Appellee's Brief on January 16, 2014. Hawkeye then filed a Reply Brief. The City Attorney provided oral argument to Judge Taylor on February 3, 2014 in support of the City Council's decision to enact the Wheel Clamp ordinance. I responded to all challenges made by Hawkeye Towing Enforcement and emphasized the extensive factual support for the ordinance and the deference that the Courts have given the City Council legislative decisions such as the enactment of the Wheel Clamp ordinance.

We returned to Circuit Court on February 12, 2014, and heard the **decision of Circuit Judge Joanna Taylor who ruled in the City's favor and dismissed the Appeal** of Hawkeye Towing Enforcement, Inc. Both attorneys agreed as to the form of the Final Judgment in the City's favor which was signed and filed for record on February 20, 2014. **As no Notice of Appeal was filed within 30 days, this case has been finally decided in City's favor.**

B. *Algene Perry v. Fayetteville Police Officer Willyard and Corporal Allen*, Case No. 12-5134, Federal District Court of the Western District of Arkansas

Algene Perry, who fled through the woods, open fields and residential areas in South Fayetteville for almost an hour before Sergeant Jason French could tackle him and stop his flight, sued two other Fayetteville Police Officers for excessive force. Even after his long flight to avoid arrest, Mr. Perry struggled and resisted arrest and claims he was injured. Our Officers acted properly and with restraint to arrest Mr. Perry whose own flight and resistance caused any minor injuries he might have suffered. The Fayetteville Police properly transported him to the Emergency Room before incarcerating this suspect who had a warrant for his arrest for a violent felony. Mr. Perry sued our officers from his prison cell in the Department of Corrections.

Our insurance company retained Mr. Brian Wood of Benson & Wood to represent our officers. The City Attorney assisted Mr. Wood in this case in an effort to dismiss the complaint by means of a Motion For Summary Judgment in our officers' and City's favor. The District Court scheduled Discovery to end by September 7 and requested a Motion for Summary Judgment thereafter. The hearing was set for January 7, 2014, but Mr. Perry failed to provide the Court required paperwork so the hearing was continued.

The Federal District Court granted our Motion For Summary Judgment after the Federal Magistrate Judge had concluded that our officers "used only reasonable force when arresting this violent, resisting

suspect (Algene Perry)." The Federal District Judge **DISMISSED** the case on January 23, 2014 against our police officers and thereby maintained the Fayetteville Police Department's perfect record when sued for excessive force or other constitutional claims during this century.

C. *Collins v. Grace Haynie and all other District Court Clerks in Arkansas, Mississippi County Circuit Court No. CIV 2013-11(PH)*

A Blytheville lawyer sued every District Court Clerk in Arkansas including Fayetteville District Court Clerk Dena Stockalper alleging an illegal exaction because (supposedly) his client had not received a \$10.00 reduction in her traffic fine even though she was wearing the seat belt when stopped. Since District Court Clerks do not have authority to reduce fines imposed by District Court Judges, this is a frivolous claim. In addition, not a single fact is alleged concerning the Fayetteville District Court nor District Court Clerk Dena Stockalper. The City Attorney placed this Blytheville lawyer on notice as the required by the Arkansas Rules of Civil Procedure (#11) that he should voluntarily dismiss or face a Motion for Sanctions. **The City Attorney then filed a Motion to Dismiss for the Fayetteville District Court Clerk and later filed a Reply to Plaintiff's 50 page Response.**

After informing the City Council at its Agenda Session of his intent to file a Motion for Sanctions and hearing only approval, the City Attorney did file a Motion for Sanctions pursuant to Rule 11 with supporting brief. **The Plaintiff belatedly nonsuited the case against Fayetteville District Court Clerk Dena Stockalper** and all other District Court Clerks except Hanie. The Circuit Judge granted the contested Motion to Dismiss, but denied our Motion for Sanctions. Because of the need to prepare motions and briefs in other cases, we decided we did not have enough time to appeal for sanctions to the Arkansas Supreme Court.

D. *Scotts v. City of Fayetteville, et al., Washington County Circuit Court Case No. CV-13-1337-2*

Mr. and Mrs. Phillip Scott sued the City, McClelland Consulting Engineers, Inc., Chicago Bridge & Iron, Inc. (CB&I, Inc.) and Sweetser

Construction Company, Inc. and served the City of Fayetteville in October of 2013. The City of Fayetteville hired McClelland Consulting Engineers, Inc. for engineering services related to a new water tank/tower to be constructed above Lovers Lane. CB&I, Inc. won the bid to construct the water tank and hired Sweetser Construction Company, Inc. for grading, site preparation and other such services.

During construction an unusually large and intense rain storm hit the area. The Scotts claim that inadequate or faulty erosion control measures by Sweetser caused flooding of their house. When the Scotts could not resolve this issue with Sweetser, they sued everyone. The Scotts claimed damages of about \$200,000.00.

The City Attorney filed an Answer and Cross-Claim against CB&I, Inc. because of its contractual obligation to indemnify the City (including attorneys fees). The City Attorney then filed a Motion for Partial Judgment on the Pleadings against Plaintiffs and argued their negligence claim against the City must fail because of the City's sovereign immunity. **The Circuit Court granted this Motion and dismissed the negligence count against the City.**

CB&I, Inc. then filed a Cross-Claim against the City contending we should be a declared a joint tortfeasor and should have a portion of any negligence assigned against us. The City Attorney filed a Motion to Dismiss this Cross-Claim based upon the City's sovereign immunity from liability and from suit. **The Circuit Court granted our motion and dismissed CB&I, Inc.'s Cross-Claim against the City.**

McClelland Consulting Engineers, Inc. also filed a Cross-Claim against all other defendants to seek an apportionment of negligent responsibility. **The City again filed a Motion to Dismiss, and the Circuit Court granted our motion and dismissed McClelland's Cross-Claim against the City.**

The City deposed the Scotts to be able to obtain sufficient evidence and admissions to support a Motion for Summary Judgment on the Scott's remaining count of inverse condemnation against the City.

The Circuit Judge granted the City's Motion for Summary Judgment and has therefore dismissed all claims of the plaintiffs against the City.

Sweetser Construction, Inc. then cross-claimed against the City for contribution if any damages would be assessed against Sweetser. The City filed a Motion to Dismiss this cross-claim which was granted.

E. *Sims v. Officer Tim Shepard*, United States District Court, Case No. 5:13-cv-05253

On March 14, 2014, the Fayetteville Police Department received a Summons and the Complaint of Melvin Louis Sims, Jr. who listed his address as the Washington County Detention Center. Mr. Sims was arrested without incident on September 28, 2013, after resisting arrest, fleeing, and endangering Officer Tim Shepard by dragging him for a short distance with his car.

Earlier on the 28th, Officers Shepard and Williamson were on foot patrol in the Entertainment District and met with three males loitering in front of the Dickson Theater. One of these males was Melvin Sims. The officers were later notified he had a suspended driver's license.

After the officers walked down to Dickson and West, Officer Shepard noticed that Mr. Sims was driving (illegally) with his car's stereo so loud it was in violation of the City's noise ordinance. Officer Shepard approached the car which was stopped at the stop light and told them to stop the car, but Mr. Sims began to drive away. Officer Shepard then kicked the door of the car, but Mr. Sims continued to accelerate away ignoring orders to stop. Officer Shepard ran along with the car and jumped into the passenger side window to try to get Sims to stop. Unfortunately, Sims refused to stop and instead accelerated faster, dragging Officer Shepard with him. Officer Shepard was able to get out of the window and slid to a stop on his hands and knees suffering road rash, abrasions, etc. and ripping his trousers. Although the officers (joined by Corporal Jennings) continued to chase Sims' car, it sped away illegally passing other cars and driving toward oncoming traffic. Sims was arrested without incident later that night.

Sims' complaint is that his car door was damaged and that he should get punitive damages for his pain and suffering despite the fact that Officer Shepard never physically touched him. Since our insurance company denied coverage, the City Attorney's Office filed an Answer on March 28, 2014, and later filed his Summary Judgment Motion.

The hearing on the Summary Judgment Motion was heard on November 4, 2014. The City Attorney cross examined Mr. Sims and forced him to admit that he chose to break the law when he decided to drive his car when his license had been suspended. Therefore, Sims knew that Officer Shepard had the right stop him when Sims illegally drove his car on Dickson Street. The Magistrate Judge filed a Report and Recommendation to the Federal District Judge on December 16, 2014 in which she agreed with our Summary Judgment Motion and arguments and recommended that the District Judge dismiss Mr. Sims' Complaint. After Mr. Sims did not object to the Magistrate Judge's Recommendation, Federal District Judge Timothy L. Brooks issued a final Order: "Defendant's Motion for Summary Judgment is **GRANTED** and this matter is **DISMISSED WITH PREJUDICE**."

F. *Yelena Goforth v. City of Fayetteville, et al.*, Washington County Circuit Court Case No. CV-2014-544-1

Yelena Goforth has filed suit against several dozen City of Fayetteville employees. The lawsuit also includes among the approximately 150 defendants President Obama, the founders of Google, other law enforcement agencies, several local church leaders, and most of the Walton family. Her petitions are handwritten and difficult to understand. In between hateful and racist comments, she alleges things that are often completely untrue or which don't even amount to any kind of wrongdoing. Six motions to dismiss have been filed by our office so far in response to Ms. Goforth's various petitions. **Judge William Storey granted our Motion to Dismiss authored by Assistant City Attorney Blake Pennington and dismissed all claims against all City defendants with prejudice.**

G. *Higgins v. Sondra Smith, Mayor Jordan, Fayetteville City Council, et al.*; Washington County Circuit Court, Case No. CV-2014-1846-6

Fayetteville City Clerk Sondra Smith, Mayor Jordan, all members of the Fayetteville City Council and the Washington County Election Commission were sued in their official capacity by Ms. Higgins who claimed Sondra erred when certifying that the referendum petition was adequate to call a special election on the Civil Rights Administration ordinance. The City Attorney defended the City Clerk's actions during the bench trial on this issue.

Circuit Judge Mark Lindsay ruled against the plaintiff who had challenged the special election on referred Ordinance NO. 5703 and sued City Clerk Sondra Smith, Mayor Jordan and the City Council as well as the Election Commission. Judge Lindsay determined that City Clerk Sondra Smith had acted properly and legally while reviewing the signatures on the petitions for a referendum and had properly certified the petition.

Judge Lindsay also denied intervenor Repeal 119's Motion for a Writ of Mandamus to require Sondra to check and certify the remaining about one thousand signatures on its petitions to ensure that they are proper legal voters. The Judge agreed with the City Attorney that there was no legal reason to place this difficult and time consuming burden on Sondra.

H. Condemnation Actions

The City Attorney and Assistant City Attorney was able to settle without resort to a jury trial all condemnations we had to file for road widening projects including: Highway 16 East, Garland Avenue, Highway 265, Highway 112 and Van Ashe Drive.

When Engineering cannot resolve the City's need for additional right of way with every affected property owner, the City Council will authorize the City Attorney to file a condemnation action to obtain possession of the property so the road widening project can be constructed. The City

Attorney's Office guards and conserves the City's treasury, but continues to attempt a reasonable settlement. If we achieve a good settlement, the City Attorney will present it to the City Council for their final approval.

Since the City Attorney began his service in 2001, **ALL** of the numerous condemnations that had to be filed for road projects, the new west side wastewater plant and its new sewer mains, our growing trail systems, etc. have eventually been amiably settled prior to jury verdict to the satisfaction of the property owner and the City Council.

II. Negotiation Highlights

A. Land Sale Agreement with Kum & Go for Tyson Property

After Kum & Go, LC proposed to purchase the Tyson Property for less than \$3.00 per square foot, the City Attorney retained a local property law specialist attorney to research what Kum & Go, LC had paid for its other twelve sites recently acquired in Northwest Arkansas. After analyzing this data which revealed Kum & Go had paid more than \$10.00 per square foot on average for its sites, the City Attorney advised the administration that the City should reply with fairer sales proposals and probably only sell Kum & Go the portion of the site it needs for its own development at the normal purchase price Kum & Go has paid to other land owners. The Mayor authorized such further negotiations until we were able to receive an offer of \$900,000.00 for less than 2 acres rather than \$945,000.00 for more than 10 acres. After this offer was presented publicly to the City Council, Casey's General Store, Inc. bid \$1,000,000.00 which was matched by Kum & Go in a January City Council meeting. The City Attorney suggested and the City Council agreed to give each company an opportunity to make one final closed offer to be opened during the City Council meeting. Kum & Go won the sale by bidding \$1,115,001.00 and agreeing to other terms such LEED construction. Kum & Go has also verbally agreed to extend the time for demolition to allow the City time to sell (rather than pay about \$130,000 to demolish) the building. This worked when a firm bid \$90,000 to demolish and recycle the metal in this building. Kum & Go paid a portion of the demolition costs and did purchase the two acre lot for **\$1,115,001.00**. The City Attorney negotiated

with representatives of Kum & Go, L.C. to obtain their agreement to cost share 50/50 the City's share (around \$75,000.00) of the left turn lane widening required by the Arkansas Highway and Transportation Department. The City Council approved this final cost by Resolution No. 42-14 passed on February 18, 2014. **Kum & Go completed their purchase and closed on the 2 acre parcel paying the City over \$1.1 million.**

B. Acquiring 600 acres for Mt. Kessler Park

The City Attorney worked with Development Services Director Jeremy Pate and Engineering Staff to accomplish the purchase of 328 acres on Mt. Kessler for \$3 million. The City Attorney drafted the **Land Purchase Agreement, Equal Value Land Swap Agreement and Acceptance of Parkland Dedication To Bank For Future Development Agreement** which were agreed to and signed by Chambers Bank and Mayor Jordan. The City Attorney also reviewed, corrected, and simplified several deeds needed to accomplish the sale, swap and dedication of over 410 acres plus a multiuse trail easement. With this purchase plus the earlier dedication of 200 acres, the City of Fayetteville now owns over 600 contiguous acres of both level baseball and soccer field land and heavily forested, mountainous wilderness in its Regional Park.

Jeremy Pate and the City Attorney will continue to work with the Walton Family Foundation to secure its promised \$1.5 million grant to assist in this purchase and with the Fayetteville Natural Heritage Association to sell certain development rights for \$300,000 to ensure the mountainous area is primarily limited to trail and trail amenity uses.

C. New 25 year lease for Walton Arts Center

The City Attorney worked with Mayor Jordan and Chief of Staff Don Marr for over a year in complex negotiations with the University; the Walton Arts Center Council, Inc.; the Walton Arts Center Foundation, Inc.; and the Walton Family Foundation to prepare significant changes to the governance documents for the Walton Arts Center, the Interlocal Agreement with the University and a replacement 25 year lease of the property to the Walton Arts Center.

We were able to include new language in these documents to ensure that the Walton Arts Center on Dickson Street would remain active and well used even after the new Bentonville facility is built. These documents promise that the Walton Arts Center will have the same quality and quantity of Broadway shows and other performances that our citizens currently enjoy. **The City will also receive back its \$1.5 million deposit** into the Walton Arts Center Foundation, Inc. which should assure the City will have sufficient funds (along with its bond funds) to construct the new parking deck and replacement headquarters building for the Walton Arts Center.

All these agreements have been approved nearly unanimously by all parties including the Fayetteville City Council

D. BioBased Realty, LLC pays City another \$200,000.00

When the City sold some land to BioBased Realty, LLC several years ago to enable it to build a research /lab building on Cato Springs Road, the City Attorney included a "claw back" provision which required BioBased Realty to pay the City a portion of increased value of the land it purchased if BioBased sold some of the land within a period of years. BioBased Realty wished to sell to the University of Arkansas a portion of the undeveloped site. **The City Attorney negotiated BioBased's payment of \$200,000.00 to the City pursuant to the "claw back" provision of the Land Sale Agreement.**

III. Hotel, Motel and Restaurant Tax Collection by City Prosecutor's Office

With no increase in staff levels, the City Prosecutor's Office working with Accounting and the City Attorney's Office has collected over **\$850,000.00** in overdue Hotel, Motel and Restaurant taxes since 2001. This \$850,000.00 has been returned equally to the Advertising and Promotion Commission and to the Fayetteville Parks and Recreation Department. The City Prosecutor has ensured no restaurant could gain an unfair advantage over its competitors by failing to remit the HMR taxes it collects to the City.